(18)

Office - Supreme Court, U. S.
FILED
SEP 23 1941
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 643

CHARLES SIMUS,

Petitioner,

vs.

FRANK E. DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

CHARLES LIEBMAN,
PEARL M. HART,
29 South LaSalle Street,
Chicago, Illinois,
Attorneys for Petitioner.

TABLE OF CONTENTS.

PAGE

Statement of the Case 1-7

The Mandamus Proceedings in the Illinois Supreme Court 4

The Opinion of the Illinois Supreme Court 7

Jurisdiction 7

The Questions Presented 8

Reasons Relied on for Allowance of Certiorari 9

Relief Sought to Be Obtained in This Court 11

Cases Cited.

Boyles v. Chytraus, 175 Ill. 370, 373 3

Hecker v. Illinois Central R. R. Co., 231 Ill. 574 10

Milkwagon Drivers' Union v. Meadowmoor Dairy, 61 S. Ct. 551, 557 9

People, ex rel. Weber v. Wells, Municipal Judge, etc., 255 Ill. 450 ..... 5, 6, 8, 10

People v. Green, Judge, 318 Ill. 421 4

People v. Williams, 91 Ill. 87, 91 3

State v. Huffaker, 7 Tenn. Civ. App. 1, 7-9 10

State v. Cooper, 64 S. W. 750, 107 Tenn. 202 10

Truax v. Corrigan, 257 U. S. 312 10

4 C. J. S. 1334 11

4 C. J. S. 1337 11

In The

Supreme Court of the United States

October Term, A. D. 1941.

No.

CHARLES SIMUS,

Petitioner,

vs.

FRANK E. DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles Simus, respectfully prays that a writ of *certiorari* issue to review a judgment of the Supreme Court of Illinois, entered June 17, 1941, dismissing a petition for writ of mandamus against the respondent in this case, by which this petitioner had sought to compel respondent to certify a report of proceedings at a trial.

The opinion of the Supreme Court of Illinois appears in full in the record (Trans. 145-147) and is reported at 377 Ill. 122, and 35 N. E. (2nd) 371. The time to file the petition for *certiorari* was extended by order of Mr. Justice Frankfurter to September 23, 1941.

STATEMENT OF THE CASE.

Petitioner, Charles Simus, was arrested by Chicago police on August 30, 1940, and brought to trial before Judge Frank E. Donoghue of the Municipal Court of Chicago on August 31, 1940. He was charged with disorderly conduct. He had no lawyer. The proceedings which constituted his trial were as follows (Trans. 14):

> The Deputy Clerk cried, "*City of Chicago* v. *Charles Simus,*" and Charles Simus stepped to the bar.
>
> And thereupon the Judge said to the defendant: "What is your trade?"
>
> And the defendant thereupon said: "I am a baker".
>
> And the Judge thereupon said: "$50.00 and costs".
>
> And the defendant thereupon said: "But, Judge, I haven't had a chance to say anything".
>
> And the Judge thereupon said: "Do you want me to disgrace you before all these people?"
>
> Whereupon, the defendant said: "But, Judge, I was right in front of the police station".
>
> Whereupon the Judge waved to the Bailiff to take the defendant away.

A judgment for $50.00 and costs was entered against Simus, enforceable by imprisonment (Ill. Rev. Stat. 1939, Ch. 24, Par. 80), and he was kept in custody until it was paid by relatives that same day.

Subsequently petitioner made a motion for new trial, setting forth want of due process in his "trial," in violation of the Federal Constitution, which was denied (Trans.

15). He then appealed the judgment of conviction to the Illinois Supreme Court (Trans. 3).

In order to obtain a review of proceedings had at the trial, under Illinois law, appellant must prepare a report of proceedings and present it to the trial Judge for settlement and certification. Upon certification, the report of proceedings is filed in the case and becomes a part of the record. In the absence of a report of proceedings, the happenings at the trial of the case cannot be reviewed. *Boyles* v. *Chytraus,* 175 Ill. 370, 373.

Petitioner therefore prepared a report of proceedings, setting up what had happened at the trial, and presented it (Trans. 4) to the respondent trial Judge.

Respondent marked it "presented" and also endorsed on it that it was not a true and accurate statement of the facts in the case (Trans. 4). He then ordered that a hearing be held for the purpose of settling the contents of the report, and determining the facts to be incorporated therein, pursuant to the Illinois Practice (*People* v. *Williams,* 91 Ill. 87, 91). This hearing was held before him on October 29, 1940, and there were present observers for the Chicago Bar Association, Chicago Civil Liberties Committee and the National Lawyers' Guild (Trans. 73). A stenographic transcript of this hearing appears in the record (Trans. 73-127).

Petitioner testified in his own behalf, and called as witnesses two bystanders. All were extensively cross-examined, but their testimony as to what happened at the "trial", which was in substantial accord with the report of proceedings, was not shaken (Trans. 74-86, 106-118). The City of Chicago, the prosecuting agency, called a police officer who had not witnessed the "disorderly con-

duct" (Trans. 96), but who had been present in court at the "trial", and who testified that the respondent had been "arraigned"; but who, even on direct examination stated that: "What was said, and what transpired, I have no recollection now, I can't recall" (Trans. 98-106). One of the arresting officers was called, who had not been present at the "trial" (Trans. 89-96).

Assistant State's Attorney Buchman, who had been present at the trial, and who offered to testify (Trans. 68) *did not testify; nor did the court bailiff or court clerk, who had been present at the original trial, testify.* Testimony in support of the report of proceedings tendered by this petitioner to the trial Judge is therefore uncontradicted, even by any assertion by respondent that his recollection was to the contrary; in other words, there is not a scintilla of evidence in contradiction of this petitioner's report of proceedings. Nevertheless, at the conclusion of the hearing, the trial judge refused either to point out any inaccuracies or to sign the report (Trans. 125-126).

The respondent has never pointed out any inaccuracies or insufficiencies in the report of proceedings which this petitioner submitted to him, nor has he at any time, at any of the hearings or elsewhere, ever asserted that he had any recollection of what had happened at the petitioner's "trial".

The Mandamus Proceedings in the Illinois Supreme Court.

Under Illinois law a trial Judge who refuses to sign a report of proceedings may be coerced by mandamus. *People* v. *Green, Judge,* 318 Ill. 421. Accordingly, this petitioner filed a petition for mandamus against Judge Donoghue in the Illinois Supreme Court (Trans. 10-17). Judge Donoghue appeared by counsel, and filed a motion to dismiss the mandamus proceedings on the ground,

among others, that the petition was insufficient (Trans. 24, 25-26). The Judge also filed an alternative motion, that in the event his motion to dismiss be denied, he have 20 days within which to file an answer.

This petitioner then filed suggestions that the pleadings be closed on the petition for mandamus and motion to dismiss, on the authority of *People ex rel. Weber v. Wells, Municipal Judge, etc.*, 255 Ill. 450, (in which the Illinois Supreme Court had held, in a mandamus suit against a judge, that "the defendant will not be allowed to reply matter of fact to the petition after submitting the case on issues of law"), and asked for a denial of the motion to dismiss and for a writ of mandamus to issue (Trans. 29-36, 31). But the Court, while it denied respondent's motion to dismiss, did not close the pleadings, and did not issue a writ of mandamus, but allowed respondent to answer over, thus in effect refusing to follow its decision cited *supra*, in *People ex rel. Weber* v. *Wells*, etc., 255 Ill. 450.

The respondent thereupon filed an answer, in which he denied that the report of proceedings which had been tendered to him by the petitioner had been true and correct; and he averred that he had prepared a true, correct and complete record of the proceedings, and had signed, sealed and certified the same, and had filed it with the Clerk of the Municipal Court on March 7, 1941 (more than six months after the "trial"). A copy of such report was attached to the answer (Trans. 40-43, 44-46). This report was not based on anything other than the *ipse dixit* of the trial Judge (See Trans. 42).

Examination of Judge Donoghue's version of the trial (Trans. 45-46), including particularly the references to the testimony of Thomas F. McNulty, shows that it differs

materially from the testimony of McNulty himself as given on the hearing to settle the report of proceedings (Trans. 97-106; particularly Trans. 99 and 100).

The judge's report of proceedings also set forth that this petitioner had been sworn and had testified against himself (Trans. 45-46), *which had not been stated, or testified to, by any person at the hearing to settle the report of proceedings, and had been expressly denied.*

Petitioner thereupon filed a motion to strike respondent's answer for insufficiency (Trans. 50-52); and, in the same document, filed an alternative reply (Trans. 52-127), to be considered in the event the motion to strike should be overruled. The alternative reply took issue with the allegations of respondent's answer and set up the proceedings which had been had at the hearings to settle the report of proceedings, including a complete stenographic transcript (Trans. 64-127).

The Supreme Court then entered an order *sua sponte,* closing the case upon the petitioner's motion to strike and refusing to consider the alternative reply (Trans. 128).

This petitioner was thus denied the right to make an issue of fact, which right had been afforded to the respondent. Petitioner thereupon filed a motion to vacate the order closing the issues, and refusing to consider his reply (Trans. 136-141). In this motion he pointed out that the right to plead over after motion to strike overruled, had been given to respondent, in spite of the decision in *People* v. *Wells,* 255 Ill. 450, which had been called then to the court's attention; that petitioner was thereby given to understand and did understand that the holding in *People* v. *Wells,* 255 Ill. 450, had been overruled; that petitioner was interested in obtaining a hearing on the merits; and petitioner offered to abandon his motion to strike (Trans. 139-140) and asked that the

Court consider his reply, and that the case be heard upon the merits. *Petitioner pointed out that the action of the Court, in giving respondent an opportunity to plead over after motion to strike overruled, while in the same case denying the same right to petitioner, would be a denial of the equal protection of the laws to petitioner, contrary to the 14th Amendment to the United States Constitution* (Trans. 139).

This motion by petitioner was overruled, and the case was decided on June 17, 1941, by a dismissal of the petition for mandamus.

The Opinion of the Illinois Supreme Court.

The opinion of the Illinois Supreme Court does not mention this petitioner's motion to vacate the order closing the case on the pleadings, nor does it pass upon the question of equal protection of the laws therein raised.

The language in the opinion, which might have been limited merely to the question of what judgment ought to be rendered on the pleadings, went, however, much farther. The court held that the only protection which a litigant has against a false report of proceedings is the trial Judge's oath of office and that his determination of the contents of the report of proceedings is utterly binding and conclusive and not subject to any revisory action, even though a hearing has been had (and, by implication, regardless of whether there was a scintilla of evidence or statement at a hearing held to settle a report of proceedings to support a version different from the one advanced by the litigant).

JURISDICTION.

This petitioner asserted in the Illinois Supreme Court (which was the court of original jurisdiction in the mandamus proceeding), and asserts here, that the procedure

in the mandamus proceeding operated to deprive him of rights preserved to him by the equal protection (Trans. 130, Brief p. 5, 139) and due process (Trans. 130, Brief p. 5) clauses of the Fourteenth Amendment. The questions are substantial, since the holding of the court below will in effect compel petitioner to have his appeal from the judgment of conviction determined upon a false statement of facts. The questions were raised at the first possible time: the equal protection question was raised when the court *sua sponte* closed the pleadings, by a motion to vacate (Trans. 139) which was denied; and also in the first brief filed (Trans. 130, Brief p. 5); while the due process question was also raised in the brief in anticipation of a holding that the trial Judge's power over the content of a report of proceedings might be absolute and arbitrary (Trans. 130, Brief pp. 5, 9).

THE QUESTIONS PRESENTED.

1. *Equal protection of the laws.* When the court permitted respondent to plead over after his motion to dismiss was overruled, and after petitioner had asked that the pleadings be closed, citing *People* v. *Wells,* 255 Ill. 450, its action was to all intents an overruling of *People* v. *Wells,* which petitioner rightfully supposed the court would adhere to in passing on subsequent pleadings. When it then *sua sponte* closed the issues on petitioner's motion to strike, and declined to consider his alternative reply, this was to all intents a reaffirmance of *People* v. *Wells,* without warning or explanation, to this petitioner's prejudice. Did its refusal thereafter to permit petitioner to abandon his motion to strike, before it had been passed upon, so that he might equally with respondent have his reply considered by the court, and the case disposed of on the merits rather than on the sufficiency of the pleadings, constitute a denial of equal protection of the laws?

2. *Due process of law.* Was the Illinois Supreme Court correct in its holding (which it will presumably follow if this cause is reversed and remanded on the first question) that a trial Judge is the absolute arbiter of the contents of a report of proceedings, and that *in no circumstances* (which presumably would cover the circumstances of this case as disclosed by petitioner's reply) may he be coerced to sign a report of proceedings except in a form agreeable to him; so that a litigant is required to have his rights determined on review by such findings of fact as it may please the trial Judge to certify no matter how conclusive the evidence that such findings are false and spurious? Or is that holding a denial of the due process of law?

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

1. The effect of the decision is to compel this petitioner to prosecute his appeal (which may come ultimately to this Court) from the judgment convicting him, upon a false record and thus to deny him constitutional liberties through spurious findings of fact by the state court. This Court has held that it will afford a remedy in such a case. *Milkwagon Drivers' Union* v. *Meadowmoor Dairy,* 61 S. Ct. 551, 557.

2. Insofar as the decision of the Illinois Supreme Court may be construed to hold that petitioner was required to have the cause determined on the pleadings consisting of the petition for mandamus, answer of respondent, and petitioner's motion to strike that answer, and that petitioner could not have his alternative reply considered, this petitioner was thereby deprived of the equal protection of the laws: because while the respondent was permitted to plead over after motion to strike overruled, the same right was not afforded to the petitioner. This

is contrary to the doctrine of *Truax* v. *Corrigan*, 257 U. S. 312, and also to a line of Illinois cases of which *Hecker* v. *Illinois Central R. R. Co.*, 231 Ill. 574, is an example. This doctrine is particularly applicable in the instant case, since the Illinois Supreme Court, by permitting the respondent to plead over after *People* v. *Wells*, 255 Ill. 450, had been called to their attention, had in effect overruled *People* v. *Wells* and had thereby led petitioner to believe that he, as well as respondent, could move to strike and retain the right to plead over in the event of an adverse decision.

3. This is the only case ever decided, so far as we have been able to find, in which the doctrine that the trial Judge has absolute power over the content of the report of proceedings, and that the litigant has no remedy against a spurious report, has been squarely asserted. In at least two cases there are *dicta contra* (*State* v. *Huffaker*, 7 Tenn. Civ. App. 1, 7-9); and *State* v. *Cooper*, 64 S. W. 750, 107 Tenn. 202). We submit that the advancement of so pernicious a doctrine ought to be examined and overruled by this court. *This is a case in which not a scintilla of evidence, or indeed of statement, sustains the version contained in the report certified by the trial Judge.* It is on its face a spurious, false, arbitrary, and oppressive act—indeed, the culmination of a series of arbitrary and oppressive acts—by the trial Judge. If this doctrine be sustained, then the trial Judge will be the only individual acting as an agency of government from whose acts, however arbitrary, unreasonable and oppressive, the person is not protected by the due process clause. (See the briefs of petitioner filed in the Illinois Supreme Court (Trans. 130, pp. 5, 7-10, and Trans. 134, p. 7).

4. The doctrine that the trial Judge is infallible in settling the report of proceedings (*i. e.*, that the ultimate truth, for purposes of review, is that which the trial Judge

is willing to certify, rather than that which actually happened) is neither fundamental nor sacrosanct. In many states the legislature has afforded a solution to the problem here presented, by enacting statutes authorizing (a) the report of proceedings to be made up by bystanders (4 *C. J. S.* 1334, citing cases from seven states), or (b) the contents of the bill to be determined by the reviewing court (4 *C. J. S.* 1337, citing cases from seven other states).

But Illinois has no such statute. If *certiorari* be denied in this case, there will be, in view of the broad language used by the court below, a doubly unfortunate result: (1) Wilful or corrupt judges will be reassured that they are subject to no corrective process, and (2) Litigants prejudiced by spurious findings of fact will be lead to believe they have no remedy.

RELIEF SOUGHT TO BE OBTAINED IN THIS COURT.

We ask that this court issue *certiorari*, and upon hearing, reverse and remand this case, with directions to the Illinois Supreme Court to proceed in the case upon the petition for mandamus, the answer of respondent, the reply of this petitioner, and such other pleadings as may be filed in the case until issues are made up; and, if this court deems it appropriate so to do, to overrule the holding of the Illinois Supreme Court which clearly implies that no power exists, where the trial Judge's report of proceedings or other finding of facts is clearly shown to be spurious, to compel him to certify a true and accurate one as shown by uncontradicted evidence.

Respectfully submitted.

CHARLES LIEBMAN,
PEARL M. HART,
Attorneys for Petitioner.

(19)

Office - Supreme Court, U. S.
FILED
SEP 27 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 643

CHARLES SIMUS,

Petitioner,

vs.

FRANK DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

PETITION TO PROCEED ON A TYPEWRITTEN RECORD.

CHARLES LIEBMAN,
PEARL M. HART,
29 South LaSalle Street,
Chicago, Illinois,
Attorneys for Petitioner.

In The

Supreme Court of the United States

October Term, 1941.

No.

CHARLES SIMUS,

Petitioner,

vs.

FRANK DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

PETITION TO PROCEED ON A TYPEWRITTEN RECORD.

This petitioner for certiorari now petitions the Court that this cause may proceed herein upon a typewritten record. In support of this petition he makes the following averments:

1. Petitioner Charles Simus was born in the city of Stuttgart, Germany, in 1897, and arrived in the United States in 1917. He has lived in this country continuously since that time and is a citizen of the United States.

2. Petitioner is a baker by trade, earning, when employed, approximately $32.00 per week. Petitioner is married and resides in the City of Chicago with his wife and two children, aged 13 and 16 years old respectively, who go to school.

3. Petitioner has not more than $50 cash. His only property consists of clothes and household furniture; and a $1,000 equity, which represents his life's savings, in a two-apartment building which is subject to a $6,500 first mortgage.

4. Petitioner has always been a law-abiding citizen, and the only time petitioner has ever been arrested, was the time when he sustained the treatment which resulted ultimately in this case being brought to this Court.

5. The experience which Petitioner underwent after that arrest shocked and horrified him. He had not realized that such things could happen in America. He made inquiries to various persons as to whether or not anything could be done not only to help him, but to prevent other persons from undergoing similar indignities and injustices and was directed to the Chicago Civil Liberties Committee, which agreed to furnish him with an attorney without charge.

6. This petitioner was not only compelled to pay $60.00 as fine and costs to keep from going to prison, but was compelled to pay $10.00 additional extorted by court attaches. He has likewise become obligated to pay costs of the appeal to the Illinois Supreme Court, and costs of the mandamus proceedings in the Illinois Supreme Court,

and the costs in this court, and also stenographer's and printer's charges. A number of persons whose interest has been enlisted, have agreed to contribute small amounts to the expense of this case, but the main burden still falls on this petitioner.

7. The Clerk of this Court has requested petitioner to deposit $355 to secure the cost of printing the record. It is impossible for this petitioner to furnish or obtain enough money to print the record in this case. Unless this Court will proceed on the typewritten record, petitioner will be compelled to abandon this petition for certiorari. But this petition for certiorari ought to be considered by the Court, not primarily for the good that will be done thereby to the petitioner if he should prevail, but because the form of procedure in use in the Illinois Courts, as disclosed by the record here, prevents persons from having their day in court; and, if they are denied their day in court, from obtaining any relief on appeal.

8. Your petitioner is not a pauper, but he is unable to pay the costs of the proceeding. For him to do so would create unbearable hardship for his wife and children. The record in this case, this petitioner is advised and believes, is simple enough so that no undue hardship would be caused to this Court if it were to consider this case upon the typewritten record.

9. Your petitioner therefore respectfully prays that this Court may permit this case to be considered and heard upon the typewritten record herein, and that printing of the record be dispensed with.

.....

CHARLES SIMUS,

State of Illinois,
County of Cook—ss.

CHARLES SIMUS, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed, and that the same is true.

.....

CHARLES SIMUS.

Subscribed and sworn to before me, a notary public, in and for the County of Cook and State of Illinois, this 25th day of September, 1941.

.....

Notary Public.

(20)

Office - Supreme Court, U. S.
FILED
OCT 18 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 643

CHARLES SIMUS,

Petitioner,

vs.

FRANK E. DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DAVID SILBERT,
Chicago, Illinois,
Attorney for Respondent.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
CORRECTED STATEMENT OF MATTERS INVOLVED	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. This Court does not have jurisdiction	5
(a) No substantial Federal question	5
(b) Federal questions not properly raised	6
(c) Decision of Federal questions not necessary to state court decision	8
(d) Decision of the Supreme Court of Illinois rests upon non-federal grounds independently and adequately supporting its judgment	9
II. The reasons advanced by petitioner for granting the petition for writ of certiorari are without merit	10
CONCLUSION	13

AUTHORITIES CITED.

Table of Cases.

Bank v. Sweeny, 1 Pet. 567 (1827)	12
Bauman v. C. I. T. Corp., 356 Ill. 336 (1934)	11
Bradstreet, Ex parte, 4 Pet. 102 (1830)	12
Brinkmeir v. Mo. Pac. Ry., 224 U. S. 268 (1911)	6
Doyle v. Atwell, 261 U. S. 590, 592 (1923)	10
Farson, Son & Co. v. Bird, 248 U. S. 268 (1918)	9
Harding v. Illinois, 196 U. S. 78, 88 (1904)	7, 8
Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341 (1919)	7
Hight v. McCoy, 46 App. D. C. 238 (1917)	12
Hooper v. Rooney, 293 Ill. 218 (1889)	11
Hulbert v. Chicago, 202 U. S. 275, 280 (1905)	8

Authorities Cited.

Table of Cases.

	PAGE
Live Oak Assn. v. R. R. Commr., 269 U. S. 354 (1925)	7
Lynch v. New York, 293 U. S. 52, 54 (1934)	7, 8
Marvin v. Trout, 199 U. S. 212, 223 (1905)	7
Milkwagon Drivers v. Meadowmoor, 61 S. Ct. 551 (1941)	4, 10
New Orleans Waterworks v. Louisiana, 185 U. S. 336, 345 (1901)	6
People v. Anthony, 129 Ill. 218 (1889)	11
People v. Williams, 91 Ill. 87 (1878)	11
Perryman v. Woodward, 238 U. S. 148 (1915)	6
Simus v. Donoghue, 377 Ill. 122, 125 (1941)	1, 9
Southwestern Bell v. Oklahoma, 303 U. S. 206 (1938)	8
Springfield v. Fulk, 96 Ark. 317 (1910)	11
Texas Ry. v. Miller, 221 U. S. 408, 416 (1910)	6
Wood v. Chesborough, 228 U. S. 672 (1912)	6
Zadig v. Baldwin, 166 U. S. 485, 488 (1897)	7

Statutes, Ordinances and Rules of Court Cited.

Sec. 237 (b) of the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 937; 28 U. S. C. A. Sec. 344	5
Chap. 193-1 of the Municipal Code of Chicago	2
Rule 12(1) of Rules of the Supreme Court of the United States, 28 U. S. C. A. following Sec. 344	5
Rule 38 (2) of Rules of the Supreme Court of the United States, 28 U. S. C. A. following Sec. 344	5
Rule 38 (3) of Rules of the Supreme Court of the United States, 28 U. S. C. A. following Sec. 344	2, note

Text-Book Cited.

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, (1936), Sec. 96	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 643

CHARLES SIMUS,

Petitioner,

vs.

FRANK E. DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

CORRECTED STATEMENT OF MATTERS INVOLVED.

Petitioner is seeking a writ of certiorari to review a judgment of the Supreme Court of Illinois denying a writ of mandamus. The writ of mandamus was requested to compel respondent, a Judge of the Municipal Court of Chicago, to settle, sign, seal and certify and order filed a report of proceedings tendered by counsel for petitioner.

The Supreme Court of Illinois found itself to be without jurisdiction to issue a writ of mandamus to compel a judge of any court to sign a particular report of proceedings. *Simus* v. *Donoghue*, 377 Ill. 122 (1941).

By the present petition for writ of certiorari, petitioner is not seeking review of the Municipal Court judgment imposing a fine against him, so facts leading to this judgment against petitioner are of no significance now. However, to correct erroneous statements of petitioner, reference to such facts is made.

A report of proceedings was filed by respondent, which shows the true facts to be in substance as follows*:

Petitioner was brought to trial before respondent for violation of a city ordinance. Petitioner appeared in person. He was arraigned, and, upon inquiry, waived a trial by jury and announced that he was ready for trial. A police officer testified to the effect that petitioner "was found lying on the sidewalk at the southeast corner of Clark Street and Chicago Avenue in an intoxicated condition so that he was unable to walk, and that he was exposing his person." Petitioner testified in his own behalf to the effect that "he was intoxicated and that he was picked up at the corner of Chicago Avenue and Clark Street" and further that "he was a baker but that he did not know what happened that night."

The Court found him guilty of disorderly conduct and entered judgment against petitioner for $50.00 and $10.00 costs. The Municipal Code of Chicago provides for punishment by fine only (Municipal Code of Chicago, Chap. 193-1).

The Federal question raised by petitioner's motion for a new trial (Petition, p. 2) is not before this Court.

---

*The report of proceedings is attached as an exhibit to respondent's answer to the petition for mandamus in the state court. No printed record has been served upon counsel for respondent pursuant to Rule 38 (3) of this Court. A motion to proceed on a typewritten record is pending but no copy of a typewritten record has been served upon respondent. For these reasons, respondent is unable to refer to pages in a printed or typewritten record.

A report of proceedings was prepared by counsel for petitioner, presumably in preparation for an appeal from the judgment imposing the fine. Respondent refused to approve the document presented to him as a correct report of the proceedings at the trial, and endorsed the document presented as "not a true and accurate statement of the facts in this case."

Thereupon, hearings were had to settle the report of proceedings. Petitioner's summary of the evidence introduced at these hearings is inaccurate.

Assistant State's Attorney Buchman, who was present at petitioner's trial, reviewed the report of proceedings tendered to respondent, and stated in open court:

> "I am positive that wasn't the case, that this is not the correct transcript of what took place."

Reference need be made to only one other example of inaccuracy. Respondent, in contradicting testimony that a certain officer was not present at the trial, stated: "the court has a distinct recollection of him being there."

Petitioner was afforded extended and full hearings to enable his counsel to submit a correct report of proceedings. Counsel refused to submit a correct report of procedings, which respondent indicated would be signed.

Thereupon, original mandamus proceedings were started in the Supreme Court of Illinois to compel respondent to sign the particular report of proceedings prepared by counsel for petitioner.

Respondent signed, sealed and certified a true, correct and complete report of proceedings and ordered the same to be filed, and the same was filed.

The Supreme Court of Illinois denied the writ of mandamus.

SUMMARY OF ARGUMENT.

1. This Court does not have jurisdiction under Sec. 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344).

(a) There is no substantial Federal question. The opinion of the Supreme Court of Illinois concerns pleading and procedural issues, as to which the decision of the State Court is final. The questions are not of general or wide importance.

(b) The Federal questions were not properly raised and preserved. Reference to the "equal protection question" in the pleadings is vague. Reference to the "equal protection" and "due process" questions in petitioner's state court brief is improper. Petitioner, by relying upon state constitutional questions, abandoned his Federal questions.

(c) It was not necessary for the Supreme Court of Illinois to decide, and the state court did not decide, the Federal questions presented in the petition for writ of certiorari.

(d) A basis for the decision of the Supreme Court of Illinois is upon the non-federal ground, namely, of its construction as to effects of writs of mandamus. This ground is broad enough to maintain the judgment of the state court, independently of any decision on Federal questions.

2. There is no merit in the reasons advanced by petitioner for granting certiorari. *Milkwagon Drivers* v. *Meadowmoor*, 61 S. Ct. 551 (1941) has no present application. The state court decision merely settles a pleading problem. The opinion of the Illinois Supreme Court follows established Illinois precedents, and it is in conformity with decisions of other state courts and of the United States Supreme Court. This Court will not prescribe legislation.

ARGUMENT.

I.

This Court does not have jurisdiction.

Petitioner has not complied with the Rules of this Court (Rule 38, par. 2 and Rule 12 (1), subpar. 3) as to the contents of the jurisdictional statement to be incorporated in a petition for writ of certiorari, having failed to set forth the appropriate statutory provision conferring jurisdiction upon this Court.

However, it is believed that the following section is being relied upon to confer jurisdiction.

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of the United States." Sec. 237 (b), Judicial Code (28 U.S.C.A. sec. 344).

This Court does not have jurisdiction under the express terms of the quoted statutory enactment for the reasons set forth below.

(a) No substantial Federal question.

There is no substantial Federal question involved in the decision of the Supreme Court of the State of Illinois.

The two elements in the state court decision concern: (1) a simple pleading proposition as to the nature of a demurrer, and (2) a local procedural issue as to the jurisdiction of that court to award mandamus, with dicta as to the scope of such writ in a proper case.

Thus, in fact, the state court decision does not involve any Federal question at all.

This Court has repeatedly held that a decision by the state court on a question of pleading or procedure in their court is final.

> *Texas Ry.* v. *Miller,* 221 U. S. 408, 416 (1910).
> *Brinkmeir* v. *Mo. Pac. Ry.,* 224 U. S. 268 (1911).
> *Wood* v. *Chesborough,* 228 U. S. 672 (1912).
> *Perryman* v. *Woodward,* 238 U. S. 148 (1915).
> Robertson and Kirkham, Jurisdiction of the Supreme Court, (1936 ed.), sec. 96.

A casual analysis of the purported Federal questions raised in the petition for writ of certiorari is sufficient to demonstrate that those questions are unsubstantial.

The questions are narrow in scope, involving merely a matter of practice under the pleadings of this particular case and a matter of local state practice as to appellate procedure.

There is no showing that the Federal questions raised are of general and wide importance.

The questions raised by petitioner are so wholly devoid of merit as to be frivolous. *New Orleans Waterworks* v. *Louisiana,* 185 U. S. 336, 345 (1901).

(b) Federal questions not properly raised.

Petitioner emphasizes that the "equal protection question" was pointed out to the Supreme Court of Illinois

in a motion to vacate an order closing the pleadings (Petition, pp. 7, 8). However, such bland reference to a Federal question in this motion to vacate, unsupported by any clear argument or authorities, is too vague and general to confer jurisdiction upon this Court. *Harding* v. *Illinois,* 196 U. S. 78 (1904).

Petitioner's statement that the "equal protection question" was raised also in the first brief filed in the Illinois Supreme Court (Petition, p. 8) is misleading. Petitioner's reference is merely to a point in his brief that the state appellate "procedure" is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. In that brief there is no specific claim of denial of equal protection of the laws or of the equal protection clause of the Fourteenth Amendment. Petitioner's reference to his brief, even if proper, is insufficient to confer jurisdiction upon this Court.

Hiawassee Power Co. v. *Carolina-Tenn. Co.,* 252 U. S. 341 (1919)
Marvin v. *Trout,* 199 U. S. 212, 223 (1905)

The "due process question" before this Court is stated by petitioner to have been raised for the first time in his brief filed in the state court (Petition, p. 8). Petitioner also refers to the "equal protection question" in that brief. This Court has repeatedly held that briefs presented to the state court, even if printed in the Supreme Court record, "form no part of the record" and, thereby, a claim of jurisdiction cannot be sustained "by reference to briefs and statements which are not part of the record." *Zadig* v. *Baldwin,* 166 U. S. 485, 488 (1897).

Lynch v. *New York,* 293 U. S. 52, 54 (1934)
Harding v. *Illinois,* 196 U. S. 78 (1904).
Live Oak Assn. v. *R.R. Commr.,* 269 U. S. 354 (1925)

Although respondent is hesitant to refer to any briefs filed by petitioner in the state court proceedings, it may be ascertained readily from his last brief filed therein that no Federal question was finally urged by petitioner for consideration by the Supreme Court of Illinois. His concluding appeal was as follows:

> "* * * we are confident that this court will, to that end, decide this case upon the entire record, in accordance with Sections 19 and 20 of Article 2 of the Constitution of 1870." (Reply Brief on Behalf of Relator, p. 7).

Thus, even if petitioner in some fashion had raised any Federal questions it is clear from the last statement of his position in the state court referring to the Illinois Constitution that any such Federal questions had been expressly waived and abandoned.

Harding v. *Illinois*, 196 U. S. 78, 88 (1904)
Hulbert v. *Chicago*, 202 U. S. 275 (277), 280 (1905)

(c) Decision of Federal questions not necessary to state court decision.

It is encumbent upon petitioner to demonstrate not only that the Federal questions were presented for decision to the Supreme Court of Illinois but that the Federal questions were actually decided, or that judgment as rendered could not have been given without deciding them, and that such decision of the Federal questions were necessary to the determination of the cause. *Lynch* v. *New York*, 293 U. S. 52 (1934); *Southwestern Bell* v. *Oklahoma*, 303 U. S. 206 (1938).

Such showing cannot be made here. No Federal question was actually decided. Judgment as rendered could

have been, and was, given without any decision on the Federal questions stated in the petition for writ of certiorari. The Supreme Court of Illinois stated in its opinion:

> "It is not competent for this court to try the question of fact and determine for the trial judge matters that are left to his legal discretion and judgment." *Simus* v. *Donoghue,* 377 Ill. 122, 125 (1941).

Actually, since the writ of mandamus was denied on the basis of lack of jurisdiction on the part of the Supreme Court of Illinois, the decision in this aspect merely determined a question of state procedure and remedy without any decision as to any Federal questions. The decision involved only a determination of its own jurisdiction.

(d) Decision of the Supreme Court of Illinois rests upon non-federal grounds independently and adequately supporting its judgment.

Even were this Court to determine that the Federal questions sought to be reviewed were properly presented and preserved in the Supreme Court of Illinois, this Court will not take jurisdiction.

In *Farson, Son & Co.* v. *Bird,* 248 U. S. 268 (1918), involving review of a mandamus suit in which it was contended that the denial of the writ by the state court impaired an obligation of contract in violation of the Constitution of the United States, this Court stated, in dismissing the writ of error for want of jurisdiction:

> "* * * We are of the opinion that when correctly tested it becomes apparent that the action of the court below involved only a ruling upon a question of remedy resting upon considerations of law broad enough to sustain the conclusion reached without any reference to the federal questions which were raised and relied upon" (p. 271).

This Court has often stated:

> "It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose." *Doyle* v. *Atwell,* 261 U. S. 590, 592 (1923).

A decision as to the effects of writs of habeas corpus was regarded as broad enough in the *Doyle* case to maintain the judgment of the lower court, independently of its decision as to the constitutional question in that case, and the writ of error was dismissed. The decision of the Supreme Court of Illinois in the instant case can only be regarded in its proper light as a decision as to the effects of writs of mandamus. This decision is broad enough to maintain the state court judgment denying the writ, independently of any alleged decision as to constitutional questions.

II.

The reasons advanced by petitioner for granting the petition for writ of certiorari are without merit.

The reasoning relied on in the first paragraph for allowance of certiorari (Petition, p. 9) to the effect that petitioner may be compelled to appeal upon a false record has no present application. The petition for writ of certiorari seeks to review the judgment denying a writ of mandamus and is not an appeal from the judgment fining petitioner.

The *Meadowmoor* case (*Milkwagon Drivers* v. *Meadowmoor,* 61 S. Ct. 551 (1941)) has no relevancy in the solution of any issues before this Court.

In the second paragraph, the reasons advanced under the guise of an equal protection label do not set forth any basis for disturbing the decision of the state court. The decision in this regard only resolves the solution of a pleading problem in conformity with recognized state practice; and, therefore, the reasons advanced are insufficient for this Court to afford review.

The due process reasons asserted by petitioner in his third paragraph on page 10 of his petition for writ of certiorari are patently erroneous. The decision in the instant case follows a long line of Illinois precedents, among which are the cases cited in the state court opinion (*People* v. *Williams,* 91 Ill. 87 (1878), *People* v. *Anthony,* 129 Ill. 218 (1889)) and recent cases such as *Hooper* v. *Rooney,* 293 Ill. 370 (1920) and *Bauman* v. *C.I.T. Corp.,* 356 Ill. 336 (1934). In the *Bauman* case, the Supreme Court of Illinois stated:

> "The judge may resort to all legitimate means of information to ascertain the accuracy of the bill he is requested to certify . . . It is the exclusive province of the judge before whom the cause was tried to determine the accuracy of the bill of exceptions presented for his signature . . . The law makes him the judge of the accuracy and propriety of the act he is called upon to verify, and it is not for other persons to determine its truth" (p. 339).

The decision of the Supreme Court of Illinois is in harmony with the decisions of the highest courts of many other states.

> "It seems to be settled that mandamus is the proper remedy to compel the signing of a bill of exceptions, not to require the trial judge to insert any particular matter in the bill, but to sign a bill of exceptions which he approves as being correct." *Springfield* v. *Fulk,* 96 Ark. 317 (1910).

> "This court has no power to compel a trial justice to do anything more than consider a bill of exceptions. It cannot compel him to sign a bill which, in his opinion, is not in conformity with the rules. It is an act of judicial discretion which this court cannot control." *Hight* v. *McCoy*, 46 App. D. C. 238 (1917).

The fundamental rationale of the decision of the Supreme Court of Illinois is in conformity with reasoning advanced by this Court in its decision in *Bank* v. *Sweeny*, 1 Pet. 567 (1828). In that case the facts disclose that it was the practice to have an execution issue for bank debts first and upon its return, if the debt were disputed, the court was to order an issue to be made up and try the action. This Court stated:

> "In the present case, the Circuit Court did not refuse to direct such an issue to be made up, which had they refused to do, a *mandamus* would have been the proper process to compel that to be done which the act requires. But the Circuit Court did direct an issue, and allow a plea of limitations.
>
> "The application now is that the circuit court be ordered to withdraw that issue, and to direct a different issue to be made up according to what counsel for the bank supposes to be a proper construction of the act.
>
> "We think this is not a proper case for a mandamus • • •."

To the same effect is *Ex parte Bradstreet*, 4 Pet. 102 (1830).

Reasons by petitioner in his fourth paragraph (Petition, pp. 10-11) as to the lack of an Illinois statute are of no merit. This Court will not enact or prescribe legislation and usurp the functions of a state legislature. Petitioner, in adhering to his reasoning, should apply to the legislature for a change in state procedural practice as to the settling

of a report of proceedings and cannot seek such a change by judicial action.

That the Illinois legislature has designated a practice whereby, by rules of the Supreme Court of Illinois, the trial judge settles a report of proceedings is a matter of state policy and legislative wisdom that this Court will not disturb. In fact, in this case the respondent, as trial judge, settled the report of proceedings after hearing testimony of bystanders.

There is no question that the present state practice complies with the constitutional safeguards prescribed under the Fourteenth Amendment.

CONCLUSION.

Although mere matters of procedure in a state court are not subject to review in this Court, it is proper to point out that the procedure followed has not deprived petitioner of any right. The judgment of the Supreme Court necessarily would have been the same, had leave been given to file the reply.

Upon the petition for mandamus alone, the Supreme Court could only have ordered respondent to certify and file *a* true and correct report of proceedings, not a *tendered* one, and upon the petition, answer of respondent, motion of petitioner to strike, reply and showing in support thereof, the same judgment only could have been rendered.

It not being contended that respondent has not filed a report of proceedings certified by him to be true and correct, there could be no judgment except that the writ be denied.

There are no matters involved in this case that call for the exercise of this Court's discretionary powers.

Not only are there no grounds set forth in the petition for writ of certiorari for the exercise of jurisdiction by this Court, but the reasons advanced to grant certiorari are essentially without merit.

Respondent urges that the writ of certiorari be denied.

Respectfully submitted,

DAVID SILBERT,
Attorney for Respondent.